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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 610

NEIL S. MACKAY,

Petitioner,

v.

BUELL A. NESBETT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, who are Justices of the Supreme Court of the State of Alaska, have been required by the pendency of these proceedings to employ counsel and to defend this suit, as though they were private litigants, in the Federal District Court, in the Court of Appeals for the Ninth Circuit and here. They deplore that under our civil practice they are required to do so. Counsel for Respondents have handled independently the defense of the case, including the present Opposition, and counsel alone assume responsibility for the content of this Opposition.

QUESTION PRESENTED

The question presented is whether the allegation of a deprivation of a federal constitutional right is sufficient to confer upon the Federal District Courts jurisdiction to review, reverse, declare null and void, and enjoin a State Supreme Court decision suspending a lawyer from practicing law, when such constitutional objections were raised and decided by the highest court of the State and certiorari was denied by the United States Supreme Court.

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

The Petition indicates no conflict among the Circuits with respect to the applicable legal principles. The District Court and the Court of Appeals did no more than follow numerous decisions of this Court. The Courts below did not depart from pertinent decisions of this Court. The Petition raises no important question of federal law which has not been well settled.

STATEMENT OF THE CASE

Neil S. Mackay, a member of the Alaska Bar, petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Ninth Circuit, which affirmed a judgment of the United States District Court for the District of Alaska dismissing the suit of Mackay against members of the Supreme Court of the State of Alaska. His action commenced in the District Court sought to enjoin and declare null and void an order of the Alaska State Supreme Court finding that Mackay had cheated or overreached a client, and suspending him from the practice of law for a period of one year.

As shown in the Opinions of the Supreme Court of the State of Alaska, *In re Mackay,* (Pet. Exhibits A, B, C), the

Alaska Bar Association commenced the State disciplinary proceeding in 1961 by filing a complaint against Mackay, an experienced member of the Bar of Anchorage, Alaska, charging him with misconduct in his office as an attorney and with violating his oath as an attorney by cheating or overreaching a client (Pet. Exhibit A, p. 1). The Court found, that Mackay had taken advantage of his client, an illiterate Finnish woman, and as a consequence had enriched himself at her expense in the amount of $7,500.00 not including legal fees he had received for services performed as her attorney.

The matter came on for hearing in September, 1961, before a Trial Committee composed of three members of the Alaska Bar Association, with the parties represented by counsel, in conformity with Alaska Rules of Procedure Relative to Disbarment. After hearing, which required several days for the taking of testimony and the arguments of counsel, the majority, i.e., two members of the Trial Committee, made a written report finding "a deficiency in conduct on the part of Mackay in overreaching his client" and recommending that Mackay be suspended from the practice of law in the State of Alaska "for not more than six months as the Board of Governors of the Bar Association should find appropriate". The third member of the Committee dissented (Pet. Exhibit A, pp. 1, 2).

After hearings on the record made before the Trial Committee, the Board of Governors of the Alaska Bar Association, by a four to two vote, sustained the dissenting member of the Trial Committee (Pet. Exhibit A, p. 4).

Thus, on the issue of misconduct, the officials of the Bar Association divided five to four. Two members of the Trial Committee and two members of the Board of Governors concluded that Mackay had been guilty of misconduct. One

member of the Trial Committee and four members of the Board of Governors decided otherwise.

A territorial statute in effect at the time the Trial Committee and the Board of Governors acted in this case provided:

> "Upon finally determining any cause involving the discipline, disbarment, suspension or reinstatement of a member of the Alaska Bar, the Board of Governors *shall certify its findings and recommendations thereon to the Supreme Court of Alaska.* Upon receiving the findings and recommendations, the Court shall, within thirty days thereafter, issue an order of disbarment, suspension, reinstatement, dismissal or otherwise, in full accordance with the recommendations of the Board." (Emphasis added.)

It is undisputed that the Board of Governors did not certify its findings and recommendations to the Alaska Supreme Court as required by the statute or otherwise make them known to the Court, and, instead, destroyed the original record.

When this case and its disposition by the Board of Governors came to the attention of the Supreme Court of Alaska by a reference in a letter of the Attorney General of Alaska to the Court, the Court promptly notified Petitioner that it proposed to take cognizance of the charges against him and he would be accorded a hearing. Counsel for Petitioner filed motions to deny review by the Court of the administrative disciplinary proceeding and argued the case before the Court on September 24, 1964, claiming lack of jurisdiction, *res adjudicata* and the absence of a complete record. Since the original transcript was not available, the case was heard by the Court upon an office copy of the three volume transcript of testimony forwarded to the Supreme Court of Alaska by the official Court

Reporter for the United States District Court for the District of Alaska who had recorded the proceedings before the Trial Committee.

The Alaska Supreme Court unanimously held that, insofar as the territorial statute attempted to impose upon the Court the mandatory duty of issuing an order in full accordance with the recommendations of the Board of Governors, it was unconstitutional as an invasion of the inherent powers of the Court to discipline members of the Bar (Pet. Exhibit A, p. 6) and that Mackay was guilty of misconduct and should be disbarred.[1]

Upon an application for reconsideration, the Court entered a second opinion which thoughtfully reviewed the principal issues later raised in Mackay's Second Amended Complaint in the District Court in this case. The Court modified its prior decision by concluding "In view of the respondent's apparent willingness to make restitution and the flexibility permitted by an order of suspension with a condition attached to applying for reinstatement, we are now convinced that more good can be accomplished by setting aside the order of disbarment, ordering respondent's suspension from the practice from law for a period of one year and until reinstated, and further ordering that respondent's reinstatement at the termination of his suspension shall be conditional upon his showing that he has [made restitution]. . . ." (Pet. Exhibit B, p. 30).

Mackay then filed a second petition for reconsideration by the Alaska Supreme Court during the pendency before the Supreme Court of the United States of a petition for certiorari, and on November 4, 1965, the United States Supreme Court granted Mackay's motion to defer decision

[1] The suggestion in the Petition, p. 5 that counsel for the Justices in their controversy with the Alaska Bar Association had advised the Justices to make this order is scandalous and untrue.

of his pending petition for certiorari until the Supreme Court of the State of Alaska had acted on his application for reconsideration. After a meticulous review of the principal contentions of Mackay, including the effect of changes in State rules governing grievances, the Alaska Supreme Court denied the petition for reconsideration (Pet. Exhibit C).

With respect to the contention of Mackay that his case was governed by a new rule promulgated by the Alaska Supreme Court on January 29, 1965, which provided that the Court would not redetermine an adjudication of dismissal by the Board of Governors, the Court pointed out that the new Rule provided that it should only apply to "a *pending matter*" as to misconduct "so far as may be practicable." The Court held that this case had been processed before the Bar Association and the Alaska Supreme Court pursuant to the old territorial Alaska Bar Act which was in force when Mackay was charged with misconduct and Mackay was not entitled to the benefit of the new Rule for several separate and independent reasons: (1) This was not a "pending matter of misconduct"; and (2) It was not "practicable" to apply the new rule to him for the logical and sensible reasons stated in the Opinion (Pet. Exhibit C, pp. 41-59).

On June 20, 1966, the Supreme Court of the United States denied certiorari without opinion, *In re Mackay*, 384 U.S. 1003 (1966) and on October 10, 1966, the Supreme Court denied Mackay's Petition for Reconsideration (385 U.S. 890).

Mackay then filed the present action in the United States District Court for the District of Alaska against Defendants, Justices of the Alaska Supreme Court. Counsel for Defendants moved to dismiss and after hearing the District

Court dismissed the suit with prejudice for lack of jurisdiction, because (a) the anti-injunction statute, 28 U.S.C. Sec. 2283, prohibited the granting of relief sought, (b) the Civil Rights Act, 42 U.S.C. Sec. 1983, did not create an exception to the anti-injunction statute, (c) the Justices of the Alaska Supreme Court were immune from suit arising from their official judicial acts, and (d) a petition for a writ of certiorari to the United States Supreme Court is the only method by which constitutional objections to state bar disciplinary proceedings may be reviewed. The District Court refused to convene a three Judge Court as requested. The Court of Appeals for the Ninth Circuit affirmed the District Court. Later Petitions for Rehearing and Suggestions for Rehearing in Banc were denied.

ARGUMENT

I.

Petitioner's Constitutional Objections Were Adjudicated by the Supreme Court of Alaska and Were Found To Be Without Substance.

Petitioner seeks the review and reversal of considered opinions and judgments of the Supreme Court of the State of Alaska which are final and conclusive. It was the duty of Petitioner to raise *there* and of that Court to consider and decide, the questions involved in that proceeding. That Court's decisions, whether correct or incorrect, constituted an exercise of judicial authority and jurisdiction. If its decision was in error, that did not make the judgment void but merely open to reversal or modification in an appropriate and timely proceeding by certiorari by the Supreme Court of the United States. Unless so reversed or modified, the judgment was an effective and conclusive adjudication.

Petitioner claims that the judgment of the Alaska Supreme Court suspending him from the practice of law was invalid as violative of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Each of his contentions was considered, analyzed and rejected in the opinions of the Supreme Court of the State of Alaska and unsuccessfully asserted in Petitioner's prior petition for certiorari to the Supreme Court of the United States.

First, Petitioner argued that there was a denial of due process and of the right to be confronted by witnesses because the Alaska Supreme Court refused to hear evidence or provide for evidence to be taken. This contention was made in his earlier petition for certiorari. The fact is that Petitioner did not elect to submit testimony before the Alaska Supreme Court and he made no request to do so. The record which was before the Alaska Supreme Court showed that counsel for Mackay participated in extensive hearings before the Trial Committee, submitted testimony and cross-examined witnesses (Pet. Exhibit A, p. 1). Thus Petitioner's right to be confronted by witnesses was protected. The Board of Governors heard no witnesses and overruled the recommendation of the Trial Committee upon the record made before the Trial Committee. It seems clear that the Alaska Supreme Court in overruling the Board of Governors had, in actuality, the same record before it as the Board of Governors.

Petitioner claimed that the Alaska Supreme Court denied him the right to a trial *de novo*. Petitioner did not request or claim such a right before the Court had decided his case in its original opinion. His motion to dismiss before the Court merely generalized that the record was too inadequate for the Court to act without a new trial. Not until *after* the Alaska Supreme Court had decided the case and found misconduct did Petitioner in his petition

for rehearing state that he had determined that, if he "had been afforded a trial *de novo* he could have overcome by competent evidence the charge of irregularities before the Board."

Petitioner claimed that there was a denial of due process because the Supreme Court of Alaska relied upon an uncertified and incomplete record of the proceedings before the Trial Committee of the Alaska Bar Association. The Alaska Supreme Court stated in its Opinion No. 257 (Pet. Exhibit A, p. 5), that the original record had been destroyed and the Court had obtained copies of the pleadings from a member of the Trial Committee and the transcript from the federal District Court Reporter. In its opinion No. 347 the Alaska Supreme Court stated that it had obtained "a full transcript of the trial proceedings" and "the entire record was loaned to respondent's counsel so that he could prepare for the hearing" (Pet. Exhibit C, p. 56).

Although Petitioner did complain before the Alaska Supreme Court of the "limited record" before the Court, Petitioner did not contend that the copy of the transcript before the Alaska Supreme Court was incorrect or inadequate in any particular respect nor did Petitioner, at any time, move to supplement the record before that Court.[2]

Second, Petitioner argued that he was denied the equal protection of the laws because his case was the only one which has been reviewed by the Alaska Supreme Court after dismissal of a charge by the Board of Governors of

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[2] Federal Civil Rule 75 (n) and Alaska Supreme Court Rule 9 (k) provide for appeals when no stenographic record was made of the proceedings below. The dangerous doctrine that the lack of the original record of a case below precludes review by an Appellate Court would provide an incentive to a party to destroy the original record. Such a doctrine has not been accepted by any Court anywhere even in a criminal case.

the Alaska Bar Association. This claim was discussed in detail in the opinions of the Alaska Supreme Court. The Court followed numerous State Supreme Court cases with respect to the inherent power of State Supreme Courts over admissions to the Bar and the discipline of members of the Bar. Nor had the Alaska Supreme Court ever made a decision to the contrary. Its decision in this case was but a confirmation of the conclusion of the earlier Federal District Territorial Court, *In re Paul*, 17 Alaska 360 (1957), that "any decisions which the [Alaska] Bar Act authorized the Board of Governors to make were merely recommendatory in character, and the only orders which have the effect of working disbarment or reinstatement of a person are the final orders of the Court. The Board itself is not invested with judicial powers, and the review referred to in the Bar Act is not a limited review, but affords re-examination of the entire record by the Court."

Finally, Petitioner urged that the Alaska Supreme Court was not a fair and impartial tribunal. If this type of allegation gives the Federal Courts jurisdiction, then it will be a rare State Court proceeding which does not permit review by the Federal Courts. The members of the Supreme Court of Alaska have disclaimed any bias or prejudice against Petitioner and the Court has also noted in this regard that under Alaska law there was no other Court which had jurisdiction to review the administrative action of the Trial Committee and the Board of Governors; accordingly Mackay's contention could not be accepted[3] (Pet. Exhibit B, pp. 25, 26).

Mackay made these same contentions in his first petition for certiorari to this Court and they appear to be the same

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[3] *Evans v. Gore*, 253 U.S. 245, 247 (1920); *Tumey v. Ohio*, 273 U.S. 510, 522 (1926); *Brinkley v. Hassig*, 83 F. 2d 351, 357 (10th Cir. 1936).

contentions made in his Second Amended Complaint in the District Court.

II.

The Courts Below Correctly Held that the Federal District Courts Have No Original or Appellate Jurisdiction to Review Decisions of State Supreme Courts.

Nothing could be more destructive of the historic relationship between Federal District Courts and the State Courts than the acceptance of Petitioner's contention that the Federal District Courts possess statutory power to review final decisions made by the State courts in order to search out federal constitutional objections to State court decisions. Merely to state the consequences of the rule espoused by Petitioner is to recognize its absurdity. The rule would wreak havoc on the federal system, inundate the federal courts with State cases, and constitute the federal District Courts as super-reviewing courts to pass on constitutional issues which have been raised and decided in the State Courts. The rule would debilitate the State judiciary. Finally, the rule would destroy the effectiveness of our existing system of review wherein state and federal grounds in a case are not fragmented but rather a state court decision on both state and federal grounds stands as a final adjudication to be upset only by the grant of certiorari and reversal by the United States Supreme Court.

The federal District Courts, of course, do not possess appellate jurisdiction to review determinations made by the State Courts. That principle, which has been settled and determined since the enactment of the Judiciary Act in 1789, is fundamental to the concept and existence of dual, co-equal state and federal court systems. The Supreme Court of the United States alone possesses statutory power to entertain a proceeding to review, reverse, modify,

or enjoin a judgment of a State Supreme Court or a federal district or appellate court. *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Chicago Life Insurance Co. v. Cherry*, 244 U.S. 23 (1917); *Hanna v. Home Insurance Co.*, 281 F. 2d 298 (5th Cir. 1960), *cert. den.* 365 U.S. 838, *reh. den.* 366 U.S. 955; *Hendron v. Yount-Lee Oil Co.*, 108 F. 2d 759 (5th Cir. 1940), and numerous other cases collected in Annotation 13 A.L.R. 2d 467 (1950).

No federal District Court anywhere in the history of our country has ever held that it had jurisdiction to review, affirm, reverse or modify or enjoin a civil judgment of the Supreme Court of a State. Since enactment of the Judiciary Act of 1789, one hundred and eighty years ago, Congress has carefully adhered to the original scheme of the federal system, and has refrained from conferring upon the federal District Courts any authority to review decisions of a State Supreme Court. Such authority has been exclusively vested in the United States Supreme Court.

The expansive view taken by Petitioner of federal District Court jurisdiction, would accord each Federal District Court a roving commission to inquire into every possible invasion of an applicant's constitutional rights. Civil decisions of even the highest courts of the States upon federal questions arising in State cases would be collaterally attacked, reviewed and reversed by the Federal District Courts. This new jurisdiction would dangerously prejudice the delicate balance of Federal-State relations and seriously downgrade the authority of the States and their judicial tribunals. There would perhaps be no single attribute of federal jurisdiction more abrasive to the relations of the States to the federal government than such an over-expansion of jurisdiction by the federal courts as applied to State cases. Decision in the State Court followed by denial

of a petition for writ of certiorari in the United States Supreme Court would become merely the starting point of interminable civil litigation in the federal system.

It would appear that there was jurisdiction in the Supreme Court of the State of Alaska and the present proceeding is merely an attempt to abrogate the judgment for alleged errors committed in the exercise of jurisdiction. Such allegations confer no jurisdiction on Federal District Courts. *Stafford v. Superior Court of California*, 272 F. 2d 407 (9th Cir. 1959), *cert. den.* 362 U.S. 979; *Drawdy Investment Co. v. Leonard*, 261 F. 2d 226 (5th Cir. 1958); *Williams v. Tooke*, 108 F. 2d 758 (5th Cir. 1940), *cert. den.* 311 U.S. 655; *Manufacturers Record Publishing Co. v. Lauer*, 169 F. Supp. 234 (E.D. La. 1959), *aff.* 268 F. 2d 187 (5th Cir. 1959), *cert. den.* 361 U.S. 913; *O'Connor v. O'Connor*, 315 F. 2d 420 (5th Cir. 1963).

If the jurisdiction of a tribunal is brought into question in a proceeding before it, the tribunal has the power to determine its own jurisdiction, and once determined, whether right or wrong, that decision cannot be attacked collaterally. *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Davis v. Davis*, 305 U.S. 32 (1938); *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 523 (1931); *City of Buffalo v. Plainfield Hotel Corp.*, 177 F. 2d 425, 427 (2nd Cir. 1949). Such a decision is entitled to full faith and credit in the Courts of other States and in the Courts of the United States. *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941).

The federal courts have been especially loath to review State Court decisions dealing with the right to practice law before the State Courts. This is a matter of uniquely local concern, and a proper respect for the manner in which local courts do their own housekeeping has suggested that

review in the Supreme Court by certiorari is the exclusive method of review.

The right to practice law in the state courts is not a privilege granted by the federal Constitution or laws. The right to practice law is subject only to the constitutional limitation that a State cannot exclude a person from the practice of law (or from any other occupation) in contravention of the due process or equal protection clauses of the Fourteenth Amendment. These are the limits of review by the Supreme Court of the United States of State disciplinary proceedings on petition for a writ of certiorari. *Theard v. United States*, 354 U.S. 278 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *In re Rhodes*, 370 F. 2d 411 (8th Cir. 1967); *Gately v. Sutton*, 310 F. 2d 107 (10th Cir. 1962). This Court has, on several occasions, pointed out that its role in reviewing state court disbarment proceedings on certiorari is extremely narrow. *Selling v. Radford*, 243 U.S. 46 (1917); *Theard v. United States, supra.*

The First Circuit, the Eighth Circuit, the Ninth Circuit and the Tenth Circuit have held that review of decisions of State Supreme Courts in disbarment proceedings may only be made by the Supreme Court. *In re MacNeil*, 266 F. 2d 167 (1st Cir. 1959); *Jones v. Hulse*, 391 F. 2d 198, 201 (8th Cir. 1968); *Clark v. State of Washington*, 366 F. 2d 678 (9th Cir. 1966); and *Gately v. Sutton, supra.*

The First Circuit has said "even a child would wonder how the federal district courts could possibly have original jurisdiction of a proceeding looking to disbarment of a lawyer from practice in the courts of the state. It is true that in the course of such a proceeding the respondent lawyer may raise questions based upon his rights under the Constitution of the United States. If so, then such constitu-

tional question may be preserved for eventual review by the Supreme Court of the United States under its certiorari jurisdiction." *In re MacNeil, supra,* at 172.

III.

The District Court Correctly Held That the Anti-Injunction Statute Bars Jurisdiction.

Congress has by enactment of the Anti-Injunction Statute, 28 U.S.C. Sec. 2283 denied jurisdiction to Federal District Courts to review State Court decisions. The Supreme Court in *Hill v. Martin,* 296 U.S. 393, 403 (1935), held that the sweep of the Anti-Injunction Statute is not narrow, but comprehensive. "Proceedings", as defined in *Hill, supra.* would be stayed in the Alaska Courts if any of the relief, injunctive or declaratory, sought by Petitioner, were granted.

Contrary to the view of Petitioner the enactment in 1871 of the Civil Rights Act, 42 U.S.C.A. 1983, did not give federal courts the power to enjoin state court proceedings or to review state court judgments. Nor did the enactment of 28 U.S.C. Sec. 1343. *Baines v. City of Danville,* 337 F. 2d 579 (4th Cir. 1964), *cert. denied* 381 U.S. 939; *Thomas v. District Court of 13th Jud. Dist.,* 270 F. Supp. 487 (D. Mont. 1967). The Civil Rights Act is not an exception to the Anti-Injunction Statute. *Stefanelli v. Minard,* 342 U.S. 117 (1951); *Levine v. Lacy,* 344 F. 2d 695 (4th Cir. 1965); *Baines v. City of Danville, supra; Goss v. State of Illinois,* 312 F. 2d 257 (7th Cir. 1963); *Warriner v. Fink,* 307 F. 2d 933 (5th Cir. 1962); *Smith v. Village of Lansing,* 241 F. 2d 856 (7th Cir. 1957); *Sexton v. Barry,* 233 F. 2d 220 (6th Cir. 1956), *cert. den.* 350 U.S. 838, *cert. den.* 352 U.S. 870; *Bottone v. Lindsley,* 170 F. 2d 705 (10th Cir. 1958); and *Island Steamship Lines, Inc. v. Glennon,* 178 F. Supp. 292 (D. Mass., 1959).

As the District Court held (Pet. Exhibit D, p. 67) the Civil Rights Act creates no exception to the immunity of Judges from suits arising out of their official judicial acts. So, too, the doctrine of judicial immunity applies to proceedings in which injunctive or other equitable relief is sought as well as in suits for money damages.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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